Supreme Court, U.S.
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No. 90-1869

In the Supreme Court of the United States

OCTOBER TERM, 1991

TED M. MARZOUCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's offense level was properly increased by two points under Sentencing Guidelines § 2D1.1(b)(1), which provides for such an increase if a firearm "was possessed during commission of the offense."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is unreported, but the judgment is noted at 930 F.2d 910 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1991. The petition for a writ of certiorari was filed on June 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to distribute and possess with intent to distribute cocaine base, in

violation of 21 U.S.C. 846, and possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 292 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A.

1. Briefly summarized, the evidence at trial showed that petitioner and his co-defendants operated a crack cocaine manufacturing operation inside a second floor apartment in Brooklyn, New York. On June 7, 1988, federal agents executed a search warrant for the apartment. As the agents entered, the occupants of the apartment tried to flee. Petitioner sought to avoid arrest by wedging himself between the refrigerator and a kitchen wall. After the agents arrested petitioner, they seized the keys to a Mercedes Benz from his pocket. From the kitchen table, they seized a large quantity of newly cooked crack cocaine that was drying on a paper towel, assorted paraphernalia that was used in preparing crack cocaine for distribution, and a written record of narcotics activity in petitioner's handwriting. In other parts of the apartment, the agents found more cocaine, thousands of crack cocaine vials, and cash. They also found a fully loaded .9 millimeter semi-automatic pistol on the floor under an end table in the living room. In a bedroom dresser, they found .45 caliber ammunition and a gun cleaning kit. In a post-arrest statement, petitioner told the agents that he had not worked in two years. Gov't C.A. Br. 4, 10, 12, 18-20.

2. At the sentencing hearing, an agent testified about information provided by a confidential informant who had visited the Brooklyn apartment on four

occasions prior to the search.[1] According to the informant, petitioner and his cousin, Michael Lawrence, were partners in the business, which processed two or three kilograms of crack cocaine each week. No one lived at the apartment; instead, it was used strictly to manufacture the drug 24 hours a day. The cousins employed a variety of workers, including cooks, cutters, packagers, steerers, street dealers, lookouts, and an "enforcer," whose job was to collect drug debts. Gov't C.A. Br. 22-24.

In calculating petitioner's offense level under the Sentencing Guidelines, the district court found that petitioner was a "supervisor" in the organization and therefore enhanced his base offense level by three levels pursuant to Guidelines § 3B1.1(b). Gov't C.A. Br. 25. The court also enhanced his base offense level by two levels pursuant to Guidelines § 2D1.1(b)(1) after finding that a firearm was possessed during the commission of the offense. Gov't C.A. Br. 50. Petitioner's final offense level was 39. He was sentenced to 292 months' imprisonment, which is within the applicable Guidelines sentencing range for that offense level and for petitioner's criminal history category. Gov't C.A. Br. 25.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A. The court held that the district court properly enhanced petitioner's offense level for possession of a dangerous weapon during the course of the offense. The court noted that the

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[1] The informant had provided information in the past that led to federal narcotics convictions, an FBI wiretap, and state murder charges. After his work in this case, he became a paid informant for the Drug Enforcement Administration and provided information leading to the seizure of one kilogram of cocaine and three federal narcotics arrests. Gov't C.A. Br. 23.

commentary accompanying Guidelines § 2D1.1 states that "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Application Note 3. In light of the evidence at trial, the district court "was entitled to find that the gun was connected to the offense, serving as a means of protection for each defendant present in the apartment." Pet. App. A4.

ARGUMENT

The court of appeals correctly upheld the two-level increase in petitioner's base offense level due to the presence of firearms during the cocaine conspiracy. At the time petitioner was sentenced, Guidelines § 2D1.1(b)(1) directed the sentencing judge to increase by two the base offense level for a drug trafficking offense "[i]f a firearm or other dangerous weapon was possessed during commission of the offense."[2] The commentary explains that "[t]he enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Application Note 3. As the commentary makes clear, the adjustment does not depend on proof that the defendant personally possessed the gun. Rather, it applies whenever the weapon was present and connected with the offense. Petitioner's contention that the enhancement applies only if he possessed the fire-

[2] Sentencing Guidelines § 2D1.1(b)(1) was amended effective November 1, 1989. "[D]angerous weapon (including a firearm)" was substituted for "a firearm or other dangerous weapon." The pertinent commentary was not changed.

arm or knew it was present finds no support in the text of the Guideline or its explanatory commentary. See *United States* v. *Lanese*, 890 F.2d 1284, 1292 (2d Cir. 1989) (knowledge of co-participant's possession of firearm is not required), cert. denied, 110 S. Ct. 2207 (1990); *United States* v. *Otero*, 890 F.2d 366, 367 (11th Cir. 1989) (same).

The general principles of relevant conduct under the Guidelines support this conclusion. At the time of petitioner's sentencing, Guidelines § 1B1.3(a) provided that in determining the defendant's offense level, the court should take into account "all acts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable." [3] Under the principles of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), petitioner was properly deemed accountable for the foreseeable possession of a firearm during the narcotics conspiracy by any of his co-conspirators. Therefore, under Guidelines § 1B1.3(a), the government was not required to show which of petitioner's co-conspirators had placed the loaded pistol in the living room or that petitioner knew the gun was present. See *United States* v. *Sanchez*, 928 F.2d 1450, 1459 (6th Cir. 1991) (for enhancement, the government need only show that the firearm was "possessed" by a member of the conspiracy and that the member's possession was reasonably foreseeable); *United States* v. *Garcia*, 909 F.2d 1346, 1349-1350 (9th Cir. 1990) (adjustment proper where co-

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[3] Sentencing Guidelines § 1B1.3 was amended effective November 1, 1989. The phrase "for which the defendant would be otherwise accountable" was substituted for the phrase "by a person for whose conduct the defendant is legally accountable."

defendant's possession of gun was reasonably foreseeable due to the large quantity of drugs involved); *United States* v. *Aguilera-Zapata*, 901 F.2d 1209, 1215 (5th Cir. 1990) (quantity of narcotics sufficient to support inference that co-conspirator's possession of a gun was reasonably foreseeable); *United States* v. *White*, 875 F.2d 427, 433 (4th Cir. 1989) (adjustment proper where co-participant's possession of a firearm was reasonably foreseeable).

The cases on which petitioner relies are easily distinguished and do not conflict with the decision below. For instance, *United States* v. *Long*, 905 F.2d 1572 (D.C. Cir.), cert. denied, 111 S. Ct. 365 (1990), does not involve a construction of the Sentencing Guidelines. Instead, the court there reviewed the sufficiency of the evidence underlying the defendant's conviction for "using" a firearm during the course of a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). Significantly, Guidelines § 2D1.1(b)(1) does not require the "use" of a firearm during the offense. Moreover, *Long* makes clear that although the court found the evidence insufficient to prove a substantive violation of Section 924(c)(1), the result might have been different if, as here, Long had been charged with conspiracy: "This analysis assumes a situation in which the government prosecutes a defendant for violating the statute as a principal. * * * [A] defendant involved in a conspiracy, regardless of whether he has possessed a firearm, can be punished as a principal based on the rule of vicarious liability for coconspirators." 905 F.2d at 1577 n.8.

In *United States* v. *Burke*, 888 F.2d 862 (D.C. Cir. 1989), the defendant was traveling alone when officers searched his tote bag and found heroin and a gun. The court of appeals held that Burke's sentence for possession of heroin could be enhanced under

Guidelines § 2D1.1(b)(1) only if the district court found that he knowingly possessed the gun or was reckless or criminally negligent in failing to ascertain that his tote bag contained a gun. 888 F.2d at 867-868. But the court also made clear that where more than one person is involved in a drug trafficking offense, enhancement is appropriate under Guidelines § 2D1.1(b)(1), as long as the defendant could reasonably foresee that one of his associates would possess a gun in connection with the offense. 888 F.2d at 868. See also *United States* v. *Lam Kwong-Wah*, 924 F.2d 298, 305 (D.C. Cir. 1991). In this case, where petitioner supervised a crack cocaine processing operation and hired an "enforcer" as part of his staff, he could readily foresee the possession of a firearm in connection with the offense. *Burke* is therefore distinguishable.

Furthermore, the scienter requirement adopted in *Burke* was based on former Guidelines § 1B1.3, which compelled the sentencing court to take into account the defendant's mental state in determining whether to enhance a sentence on the basis of uncharged conduct. In November 1989 that Section was amended to delete the scienter requirement; therefore the analysis employed in *Burke* will not apply to defendants sentenced for crimes committed after the effective date of the amendment. See *United States* v. *Lam Kwong-Wah*, 924 F.2d at 304 (scienter is not required as a general matter under the amended Guidelines); *United States* v. *Fiala*, 929 F.2d 285, 289 (7th Cir. 1991) (same); *United States* v. *Suarez*, 911 F.2d 1016, 1020 (5th Cir. 1990) (same). Any tension between the decision in *Burke* and the unpublished decision in this case will therefore have no continuing significance for future cases. More generally, because the Sentencing Commission

regularly promulgates clarifying amendments on sentencing issues that divide the lower courts, the intervention of this Court is not ordinarily needed to resolve a dispute over the proper interpretation of a Guideline. *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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